

Separate Opinion by Juge Rafaâ Ben Achour

1. concur with the entire operative part of the judgment in *Ladislus Chahula*. However, as regards the violation of the right to the inherent dignity of the human person, guaranteed under Article 5 of the Charter, I wish to express my opinion on this issue and underscore the fact that I do not share the following view held by the Court:

“The Court notes that the Applicant was sentenced to death by hanging. In this regard,

The Court recalls its established jurisprudence that hanging as a method of executing the death penalty constitutes a violation of the right to inherent dignity as protected under Article 5 of the Charter ”.¹

Accordingly, the Court finds that the Respondent State violated the Applicant’s right to inherent dignity protected under Article 5 of the Charter, through the method of implementing the death penalty, that is, by hanging”.

2. In my opinion, the reason for the violation is not the method of carrying out the death penalty, that is, by hanging, but precisely the death penalty itself. Hanging is of course a barbaric and cruel method, just like all other methods of execution of the death penalty, including the so-called soft methods, and therefore constitutes a flagrant violation of human dignity.
3. What I intend to underscore here is that though the method of execution of the death penalty violates the right to dignity, it remains the same thing as the death penalty itself. The second Optional Protocol of the ICCPR on the abolition of the death penalty² is quite clear on this when it solemnly declares that:

¹ *Rajabu and others v. United Republic of Tanzania*, *ibid.*, §§ 119 and 120; *Gozbert Henerico v. United Republic of Tanzania*, *ibid.*, §§ 169 and 170 and *Amini Juma v. United Republic of Tanzania*, §§ 135 et 136.

² Sébédien Touzié (Dir), *L’abolition universelle de la peine de mort*, Actes du colloque des 9 et 11 octobre 2014, Paris, Pedone, 2016.

“Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights [...]

Recalling article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948, and article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966 [...]

Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable”

4. In the same vein, the Human Rights Committee, in its General Comment No. 6 underscores that Article 6 of the ICCPR³; “refers generally to abolition in terms which strongly suggest [...]) that abolition is desirable”. The same reasoning applies to Article 4 of the African Charter
5. The death penalty is in fact an arbitrary, inhuman, cruel and degrading punishment that is inconsistent with human dignity. Its intangible nature has been enshrined in international human rights instruments since the adoption of the Universal Declaration of Human Rights in 1948. In this regard, the UN Secretary General clearly stated during the commemoration of the International Day of the fight against the death penalty on 9 October 2014, that “The death penalty undermines human dignity [...] The death penalty is unjust and incompatible with fundamental human rights”.
6. The right to human dignity means that human beings should be treated as such, not as inanimate objects or as animals which, by the way must also be treated with respect.
7. All contemporary human rights protection instruments guarantee the right to human dignity, practically in the same terms.

³ “[...] No one shall be arbitrarily deprived of his life”.

8. The United Nations Charter⁴ sets the tone in this regard in the second sentence of its preamble where it is stated “the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person.” The UNESCO constitution, for its part, affirms that “the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern. Furthermore, the UDHR in the first sentence of its preamble and in its Article 1, declares as follows: “All human beings are born free and equal in dignity and rights”.
9. Without parading multiple quotations, I would simply want to indicate the main instruments which guarantee, inter alia, human dignity. They are as follows:
- The four Geneva Conventions on humanitarian law of 12 August 1949 (Articles 3)⁵;
 - The two 1966 International Covenants on Human Rights⁶;
 - The UN Convention against Torture, Inhuman, cruel and Degrading treatment⁷;
 - Protocol No. 13 of 3 May 2002 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances⁸;

⁴ Voir : Rafaâ Ben Achour, « La Charte des Nations Unies : Fondement de l'ordre international des droits de l'homme », *Revue tunisienne des sciences juridiques et politiques*, N°1, 2017 – 1, p : 17 – 25.

⁵ “[T]he following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons [...] Outrages upon personal dignity, in particular humiliating and degrading treatment;

⁶ International Covenant on Civil and Political Rights of 16 December 1966, which entered into force on 23 March 1976) and International Covenant on Economic, Social and Cultural Rights, of 16 December 1966, which entered into force on 3 January 1976.

⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, which entered into force 26 June 1987.

⁸ “Convinced that everyone’s right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings”.

- The Additional Protocol to the American Convention on Human Rights on Economic, Social and Cultural Rights⁹;

10. At the level of Africa, the African Charter on Human and Peoples' Rights affirms in its Article 5 that: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status" while its Article 19 provides that "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights". Similarly, the Protocol to the African Charter on the Rights of Women of 2003, recognizes in its Article 3 the right of every woman to the respect of the inherent dignity of the human being, to the recognition and protection of her human and legal rights. Furthermore, the Constitutive Act of the African Union in its preamble mentions the heroic fights by African peoples and countries for their independence, human dignity and economic emancipation.
11. This important treaty provision is proof of the fundamental nature of the right to dignity among the body of human rights. It is indisputably the foundation of all rights. As noted by Henri Bandolo Kenfack, "The notion has become an operational universal legal concept to designate what is human in mankind, which needs to be protected, because any attempt at denying humanity is considered as a violation of this dignity".¹⁰
12. Punishing an individual by taking away his life is a flagrant violation of this universal and inalienable right. In this regard, Nadia Bernaz aptly underscores "Death, by taking away one's life against his will would be an atrocity in itself, an unworthy behavior in principle, a lack of respect for the

⁹ Adopted in San Salvador, El Salvador on 17 November 1988, at the eighteenth Ordinary Session of the General Assembly: " "Everyone has the inalienable right to respect for his life and [...] this right maynot be suspended for any reason whatsoever".

¹⁰ Henri Bandolo Kenfack, "Human dignity and the abolition of the death penalty in the era of the threat of terrorism», *The journal on human rights* online], 17, 2020, p.7. "The Court notes that, raised in the context of Article 4 of the charter, the question of the death penalty pertains to whether its imposition constitutes an arbitrary deprivation of the right to life. That is because Article 4 of the charter does not mention the death penalty. The Court observes that, despite a global trend towards the abolition of the death penalty, including the adoption of the Second option Protocol to the international covenant on civil and political Rights, the prohibition of the death sentence in international law is still not absolute". Judgment of 28 November 2019, Application N° 007/2015, *Rajabu and others v. United Republic of Tanzania.*, §96.

human being”.¹¹ For the Inter-American Court, “[t]he death penalty is a violation of the right not to be deprived of life ‘arbitrarily’, as stipulated in the relevant provisions of the human rights treaties”.¹² The Human Rights Commission (replaced by the Human Rights Council) is: “Convinced that abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights”.¹³

13. In all its judgments in applications where the “mandatory” death penalty, still in force in Tanzania, was imposed on defendants for various forms of homicide, our Court has often and justly held that this punishment is a violation of the right to life under Article 4 of the Charter;¹⁴ this is consistent with the jurisprudence of the Human Rights Committee on the obligatory death penalty.¹⁵ In some judgments, it even went further to focus on the global and African trends in favor of the abolition of capital punishment. In its judgment in *Ghati Mwita*, the Court:

“[a]cknowledged global trends towards the abolition of the death penalty, represented, in part, by the adoption of the Second Additional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

At the same time however, it notes that the death penalty remains in the statute books of some states and that no treaty on the abolition of the death penalty has gained universal ratification. Presently, the Second Optional Protocol to the ICCPR, the Court notes, has ninety state parties out of one

¹¹ Nadia BERNAZ, “Le droit international et la peine de mort”, Paris, *La Documentation française*, 2008, p. 23.

¹² IACHR, O.C., 1st October 1999, p. 264, para 37 and p. 268, para 141.

¹³ Res.1997/12, 3 April 1997 and Res. 1998/8 of 3 April 1998. See Amnesty international, Human rights v. death penalty. Total or partial Abolition in law and in practice, London, December 1998, Index AI: ACT 50/13/98

¹⁴ “The Court holds that the Court holds that the mandatory nature of the imposition of the death penalty as provided for in Section 197 of the Penal Code of Tanzania constitutes an arbitrary deprivation of the right to life. The Court therefore finds that the Respondent State has violated Article 4 of the Charter”. *Rajabu and others v. United Republic of Tanzania*, *supra*, § 114.

¹⁵ For the Committee: “The automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any opportunity to take into account the personal circumstances of the accused or the circumstances of the particular offence.” *Weerawansa v. Sri Lanka*, Comm. 1406/2005, U.N. Doc. CCPR/C/95/D/1406/2005 (HRC 2009).

hundred and seventy-three (173) state parties to the ICCPR [...]

Specifically, in relation to Africa, the Court takes cognizance of the continent-wide developments in relation to the death penalty.

By way of illustration, in 1990, only one country, Cape Verde had abolished the death penalty.

Today, out of the fifty-five (55) African Union Member States, twenty-five (25) have abolished the death penalty in law, fifteen (15) have placed a long-term moratorium on executions while fifteen (15) retain capital punishment.

Most recently in 2020, Chad abolished the death penalty, followed by Sierra Leone in 2021 and the Central African Republic and Equatorial Guinea in 2022”.

14. Unfortunately, the Court has not learnt from these trends and has not pondered why so many countries have either abolished the death penalty¹⁶ or suspended it in fact or in law. Seized with applications where the death penalty was imposed on the applicants, the Court has often systematically granted provisional measure *proprio motu*, ordering the Respondent State to stay execution of the death penalty.
15. Till date however, our Court has not dared to cross the threshold to declare that the death penalty itself is incompatible with the right to life and the right to dignity. Through a very restrictive interpretation and a “minimalist approach” of Articles 4 and 5 of the Charter,¹⁷ the Court has

¹⁶ On 17 December 2024 (79th session), the UN General Assembly passed a draft resolution on a moratorium on the death penalty by 130 votes to 32, with 22 abstentions. It declared itself “[C]onvinced that a moratorium on the use of the death penalty contributes to respect for human dignity and to the promotion and progressive development of human rights, and considers that there is no conclusive evidence of the deterrent value of the death penalty”.

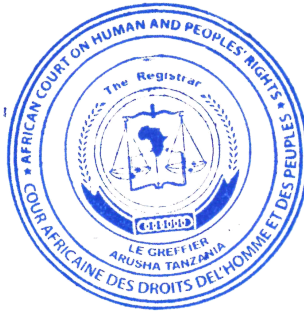
¹⁷ In this regard, see the dissenting or separate opinions of Judge Blaise Tchikaya, notably in *Ally Rajabu and others v. United Republic of Tanzania* of 28 November 2019; *Lucien Ikili Rashidi v. United Republic of Tanzania* of 28 March 2019; *Evodius v. United Republic of Tanzania* of 26 February 2021; *Thomas Mgira v. United Republic of Tanzania* of 3 June 2023; *Umalu Mussa v. United Republic of Tanzania* of 13 June 2023; *John Lazaro v. United Republic of Tanzania*; *Makangu Misalaba v. United Republic of Tanzania*; *Chrizant John v. United Republic of Tanzania* of 13 June 2023; *John Lazaro v. United Republic of Tanzania*; *Makangu Misalaba v. United Republic of Tanzania*; *Chrizant John v. United Republic of Tanzania* of 7 November 2023; *Gerald Koroso Kalonge v. United Republic of Tanzania*, *Kija Nestory Jinyamu*

consistently refused to consider that the death penalty in itself is a violation of human dignity.

16. However, as stated in paragraph 12 above, the Court, in several judgments, underscored the global trend to abolish the death penalty and to observe a moratorium on the enforcement thereof.
17. In my opinion, it is time for the jurisprudence of the Court to develop on the right to dignity in its relationship with the death penalty by aligning with the general trend of International human rights in this area.¹⁸ There is no rigid and static jurisprudence. The development of jurisprudence is proof of vitality of a court and manifestation of the fact that the law is a living and changing discipline.



Juge Rafaâ Ben Achour



v. United Republic of Tanzania, Lameck Bazil v. Republic of Tanzania, Rashidi Romani Nyerere v. United Republic of Tanzania of 13 November 2024

¹⁸ See: Adrien Donneaud, "Peine de mort et droits de l'homme entre enjeu géopolitique et impératif éthique", *Études sur la mort, Thanatologie*, Centre international des études sur la mort, 2012, n° 147, p : 9 - 24 ; Anca Ailincăi, Charlotte Piveteau, Nordine Drici (Dir), *Peine de mort et droits de l'homme*.